IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 287 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ANILKUMAR CHAITARBHAI VASAVA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR PK SHUKLA for Appellant
MS.DS PANDIT, ADDL.PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 05/10/2007

ORAL JUDGMENT

1. Heard Mr. P.K. Shukla, learned counsel appearing for the appellant and Ms. D.S. Pandit, learned APP for the State.

2. The present memo of the appeal is received through the jail authorities. The appellant-convict, by way of the present appeal, has challenged the legality and validity of the order of conviction and sentence passed by the learned Additional Sessions Judge [5th Fast Track Court], Mehsana, in Sessions Case No. 161 of 2003, where under the appellant-convict has been held guilty of the charge of offences punishable under Sections 363, 366 and 376 of I.P.C. For the offence punishable under Section 363 of I.P.C., the appellant is sentenced to undergo rigorous imprisonment for 2 years and to pay fine of Rs. 1,000/- and in default of payment of fine, further punishment is imposed upon the appellant-convict of simple imprisonment for 3 months. For the offence punishable under Section 366 of I.P.C., the appellant-convict is sentenced to rigorous imprisonment for 3 years and to pay fine of Rs. 2,000/- and in default of payment of fine, he has been sentenced to simple imprisonment of 6 months. For the offence punishable under Section 376 of I.P.C., the

appellant-convict is sentenced to rigorous imprisonment of 7 years and to pay fine of Rs. 3000/- and in default of payment of fine, 1 year's simple imprisonment is imposed upon him. Of course, these sentences are ordered to run concurrently. It is further ordered by the learned trial Judge that in the event of recovery of amount of fine, the victim may be paid Rs. 3,000/-.

3. Mr. Shukla, learned counsel for the appellant has taken me through the order under challenge as well as the oral evidence of the victim and the doctor examined during the trial. After some deliberations, Mr. Shukla has fairly conceded that he may not press the appeal against the order of conviction recorded by the learned trial Judge, because, it appears that the victim may not have completed 16 years of age at the time of the occurrence of crime. As per school leaving certificate exh. 46, the victim was 16 years and 10 months on the date of the incident. However, as per the opinion of the doctor after ossification test, it is opined

that the victim was 16 to 17 years of age. Therefore, it is submitted that even if it is accepted that she had not completed 16 years, it should be held that she was more than 15 years. Father of the victim examined during the trial has stated that date of birth of the victim registered in the school was not given by himself but was given by his younger brother. However, he has not been examined. It is stated by the P.W. 11 [exh.32] that the date of birth of the victim was given to the school authorities by stating approximate age and therefore, in such situation, as per the settled legal position, the learned trial Judge ought not to have given weightage to this document exh. 46.

4. It is pointed out by Mr. Shukla that on the date of the offence, the appellant-accused was about 19 to 20 years of age; that he had some attraction towards the victim girl and vice versa; that the father of the victim girl has admitted in his cross-examination that the appellant-convict had expressed his intention

to marry the victim girl. Therefore, it is submitted that in such situation, the learned trial Judge, at least, ought not to have imposed rigorous imprisonment for 7 years. Ultimately, there are clear elements of consent. It is also clear that the victim had left her parental home of her own free will and not on account of any inducement or threat given by the accused and thus, conviction for the offence punishable under Section 366 of I.P.C. would become unsustainable. However, without entering into the intricacies of law, it is submitted by Mr. Shukla that the appellant-accused has instructed him not to press the appeal. So far as the conviction recorded by the learned trial Judge is concerned, in the alternative, it is submitted by Mr. Shukla that in such or similar cases, the learned trial Judge was authorized to impose punishment of less than the minimum prescribed. He has drawn the attention of this Court to the proviso to Section 376 of I.P.C., where under the Court is empowered with discretion to impose less punishment than the

minimum prescribed. In cases of teenagers where element of consent is found emerging, the Courts are imposing punishment up to the period of 3 to 4 years. He has drawn the attention of this Court to the decision of this Court in the case of **Himat Popatlal Raval v. State of Gujarat, reported in 1983 GLH 264** wherein this Court has reduced the punishment to one and half years. Mr. Shukla has also drawn the attention of this Court to one another judgment of this Court in the case of **Kamabhai @ Kamlesh Dalabhai Patel v. State of Gujarat *rendered in Criminal Appeal No. 934 of 2005 on 19.9.2007,*** wherein the Court has reduced the punishment of the appellant-accused to 6 years. In the said case, the accused was of 17 years of age and the girl had even crossed 11 years. It would be beneficial to reproduce the relevant part of the judgment in the above case as under:-

> *"According to Shri Japee, as he has not pressed the conviction seriously and the appellant was of about 17 years of age at the time of commission of offence, the Court should show some leniency and the punishment may be reduced to five years. The doctor who*

has examined the appellant has said in his deposition that the appellant was a boy of about 17 years of age. But reduction of punishment to five years perhaps would not be an adequate punishment because if the appellant would have been held guilty for the offence of attempt to commit rape, then also the learned trial Judge could have imposed five years' rigorous imprisonment. But when the Apex Court has imposed 07 years' rigorous imprisonment in the case were the accused was of 19 years of age, in the present case, if the punishment is reduced by one more year and the appellant is asked to undergo rigorous imprisonment for six years, then also it would carry the same message of deterrence to the society at large. The Court also should be conscious of the fact that a teen-ager if is kept for several years more in Jail, then he would become a harden criminal. The Court is also aware about the condition of jails and type of inmates in the common barracks. So reduction of one year in the substantive punishment imposed by the learned trial Judge may help the appellant in re-settling in his life. Basically the appellant was an agriculturist and a rustic villager. So the scope of improvement is substantially there. Of course, Shri Bhate has resisted for any reduction in the period of substantive punishment."

5. Ms.D.S. Pandit, learned APP has opposed the appeal and submitted that the judgment and order of conviction and sentence recorded by the learned trial Judge is legal and valid and is not required to be interfered with.

6. In view of the submissions made by Mr. Shukla,

and the judgments cited above, this Court is of the view that this is also a case where substantive sentence can be reduced to 4 years from 7 years without altering the quantum of fine imposed by the learned trial Judge and the punishment imposed in default of payment of fine vide judgment under challenge.

7. The appeal is partly allowed. Judgment and order of conviction rendered in Sessions Case No. 161 of 2003 by the learned Additional Sessions Judge, [5th Fast Track Court], Mehsana on 12.1.2004 for all the offences is hereby upheld. However, order of substantive sentence imposed by the learned trial Judge so far as the offence punishable under Section 376 of I.P.C. is concerned, it is modified and reduced to rigorous imprisonment for 4 years. Now the accused shall undergo rigorous imprisonment for 4 years for the offence punishable under Section 376 of I.P.C., instead of 7 years imposed for the said offence. So far as the substantive punishment imposed for the offence punishable under Section 366 of I.P.C., is concerned, it is

reduced to 50%, that is, one and half years and so far as the substantive punishment for the offence punishable under Section 363 of I.P.C. is concerned, it is reduced to one and half years instead of 2 years. All these punishments shall run concurrently. Amount of fine imposed for all these three offences shall remain unaltered including the punishment imposed in default of payment of fine. Order and direction accordingly.

[C.K. BUCH, J.]

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